

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In The Matter of )  
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APPLICATION OF SBC COMMUNICATIONS, )  
INC. AND AMERITECH CORPORATION )  
FOR TRANSFER OF CONTROL OF )  
AMERITECH CORPORATION TO SBC )  
COMMUNICATIONS, INC. )  
)

CC Docket No. 98-141

COMMENTS  
OF THE  
TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS  
RESELLERS ASSOCIATION

Charles C. Hunter  
Catherine M. Hannan  
HUNTER COMMUNICATIONS LAW GROUP  
1620 I Street, N.W.  
Suite 701  
Washington, D.C. 20006  
(202) 293-2500

October 15, 1998

Its Attorneys

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## **SUMMARY**

The Telecommunications Resellers Association, a national trade association representing nearly 700 entities engaged in, or providing products and services in support of, telecommunications resale, hereby submits the following comments addressing the pending application for authority to transfer control of Ameritech Corporation to SBC Communications, Inc. This application reflects the third combination among what once were the seven BOCs, SBC having previously acquired PacTel, and Bell Atlantic having previously acquired NYNEX. While the Commission sanctioned the SBC/PacTel and Bell Atlantic/NYNEX mergers, it has done so with increasing reluctance, recognizing the substantial competitive harms that are likely to be generated by such combinations.

TRA urges the Commission to scrutinize the proposed SBC/Ameritech merger (which will combine what are now the second and fourth largest of the five remaining BOCs into the nation's largest incumbent LEC) even more closely than the previous two BOC combinations. The more and larger the combinations of incumbent LECs, the greater the threat to nascent local exchange competition and ultimately to competition in the interexchange and other markets. Certainly, the Commission should require commitments no less compelling than those extracted from Bell Atlantic and NYNEX to mitigate the negative impacts of the proposed merger on competition before contemplating approval of the SBC/Ameritech combination. Given the magnitude of the resulting entity, however, such commitments may not be adequate to counter-balance the competitive damage that the merger will likely produce.

At some point the Commission must simply draw the line and refuse to permit any further combinations of large incumbent LECs until such time as they have ceased to be the

dominant provider in the market. Given the continuing refusal of incumbent LECs, including SBC and Ameritech, to fully open their respective local markets to competitive entry, that time is probably now. The Commission cannot, and should not, sit idly by as resistant monopolists fortify their monopoly bastions against competitive intrusion.

Short of outright denial, TRA recommends that the Commission up the ante by converting mere post-merger commitments into pre-merger conditions. In other words, let actions rather than words be the driving force. Require SBC and Ameritech to implement the various commitments enumerated in Appendices C and D to the *Bell Atlantic/NYNEX Merger Order*, as well as any further conditions imposed here, before permitting them to consummate the proposed transaction.

TRA also recommends that the Commission revisit several conditions it rejected in the *Bell Atlantic/NYNEX Merger Order*. Two matters are of particular importance in this regard. First, identification of "competitive checklist" compliance as a precondition to merger approval would further statutory and regulatory aims, requiring SBC and Ameritech to do what they are required by law to do anyway in order to secure a benefit to which they have no entitlement. Obviously, in-region, interLATA authority has proven to be an inadequate "carrot," primarily because the BOCs believe that they will eventually be granted such authority without "competitive checklist" compliance if they maintain political pressure at a high enough level. Perhaps the merger "grail" will prove more enticing.

The second matter TRA believes should be revisited involves various reforms necessary to render local competition viable, including the provision of unbundled network element ("UNE") "platforms," as well as UNEs in existing combinations, and collocation reform,

encompassing the availability of electronic means of disassembling and recombining UNEs, as well as such variations as "cageless" and "shared" collocation. It has become more and more apparent that these reforms are essential to broad scale local competition. Accordingly, these are the types of conditions that potentially could offset the significant competitive harms associated with a merger among a declining population of large incumbent LECs.

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**CC Docket No. 98-141**

**COMMENTS OF THE  
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"),<sup>1</sup> through undersigned counsel and pursuant to Public Notice, DA 98-1492 (released July 30, 1998), hereby submits the following comments addressing the application ("Application") of SBC Communications, Inc. ("SBC") and Ameritech Corporation ("Ameritech") for authority to transfer control of Ameritech to SBC as part of a proposed merger of the two entities, pursuant to which Ameritech would become a wholly-owned subsidiary of SBC. The instant Application reflects the third combination among what once were the seven Bell Operating Companies ("BOCs"), SBC having previously acquired

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<sup>1</sup> A national trade association, TRA represents nearly 700 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA is the largest association of competitive carriers in the United States, numbering among its members not only the majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers.

Pacific Telesis Group (“PacTel”),<sup>2</sup> and Bell Atlantic having previously acquired NYNEX Corp. (“NYNEX”).<sup>3</sup> While the Commission sanctioned the SBC/PacTel and Bell Atlantic/NYNEX mergers, it has done so with increasing reluctance, recognizing the substantial competitive harms that are likely to be generated by such combinations. TRA urges the Commission to scrutinize the proposed SBC/Ameritech merger (which will combine what are now the second and fourth largest of the five remaining BOCs into the nation’s largest incumbent local exchange carriers (“LEC”)<sup>4</sup>) even more closely than the previous two BOC combinations. The more and larger the combinations of incumbent LECs, the greater the threat to nascent local exchange competition and ultimately to competition in the interexchange and other markets. Certainly, the Commission should require commitments no less compelling than those extracted from Bell Atlantic and NYNEX to mitigate the negative impacts of the proposed merger on competition before contemplating approval of the SBC/Ameritech combination. Given the magnitude of the resulting entity, however, such commitments may not be adequate to counter-balance the competitive damage that the merger will likely produce.

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<sup>2</sup> Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Pacific Telesis Group and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 2624 (1997).

<sup>3</sup> Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985 (1997).

<sup>4</sup> Federal Communications Commission, Preliminary Statistics of Communications Common Carriers, 1997 Edition.

## **I. The Standard**

In approving the Bell Atlantic/NYNEX merger, the Commission made clear that the BOC applicants bore the burden of demonstrating that the proposed combination would further the public interest, convenience and necessity, and that such a demonstration must include a showing that the merger would "enhance and promote, rather than eliminate or retard, competition."<sup>5</sup> Applicants proposing a merger which eliminates "potentially significant sources of the competition that the Communications Act [of 1934 ("Communications Act")], particularly as amended by the Telecommunications Act [of 1996 ("Telecommunications Act")], "sought to create, for example, must demonstrate that the facial "harms to competition . . . are outweighed by benefits that enhance competition."<sup>6</sup> And this is particularly true when the proposed combination is "between incumbent monopoly providers and possible rivals during . . . [the] initial period of implementation of the . . . [Telecommunications] Act."<sup>7</sup> Moreover, the analysis must encompass the competitive impacts of the proposed merger not only on competition during this initial period of implementation, but on the post-implementation market in which the merged entity would be providing in-region, interLATA service in both the SBC (and PacTel) and Ameritech local service areas, as well as potentially, the Southern New England Telephone Company ("SNET") service area.

As the Commission has noted, the Communications Act "permits the Commission to impose [on a proposed merger of incumbent LECs] such conditions as are necessary to serve the

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<sup>5</sup> Id. at ¶¶ 2 - 3.

<sup>6</sup> Id.

<sup>7</sup> Id. at ¶ 4.



public interest."<sup>8</sup> Thus, Section 214(c) of the Communication Act expressly empowers the Commission to attach to any approval "such terms and conditions as in its judgment the public convenience and necessity may require."<sup>9</sup> Properly construing "the Title II public convenience and necessity standard . . . 'to secure for the public the broad aims of the Communications Act'," the Commission has emphasized that "the public interest standard necessarily encompasses the goals of promoting competition and deregulation."<sup>10</sup> As such, "[t]he [Communications Act] public interest standard, and the competitive analysis conducted thereunder, are necessarily broader than the standard applied to ascertain violations of the antitrust laws," allowing for consideration of "trends within and needs of the industry, the factors that influences Congress to enact specific provisions for a particular industry, and the complexity and rapidity of change in the industry."<sup>11</sup>

Applying these standards in the context of the Bell Atlantic/NYNEX merger, the Commission cited as a potential harm to competition sufficient unto itself to warrant denial of the proposed combination the elimination of not only a likely independent significant competitive provider within both the Bell Atlantic and NYNEX service areas of "local exchange and exchange access services, and unbundled local exchange, exchange access and long distance services," but an independent entity "possess[ed of] significant assets and capabilities that otherwise would enable

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<sup>8</sup> Id. at ¶ 29.

<sup>9</sup> 47 U.S.C. § 214(c).

<sup>10</sup> Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp.. Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985 at ¶ 31.

<sup>11</sup> Id. at ¶ 32.

it to compete with NYNEX [or Bell Atlantic, as applicable]."<sup>12</sup> As the Commission explained, the proposed combination would strengthen the incumbent's market power against competitive entry by a significant potential market participant and increase the likelihood of coordinated action among remaining market participants to increase prices, reduce quality or restrict output.<sup>13</sup> Thus, the Commission concluded that, without more, the potential harms to competition that would result from the Bell Atlantic/NYNEX merger outweighed the benefits that would purportedly flow from the combination. It was only because the applicants committed to a series of pro-competitive conditions that approval of the merger was possible and even then, the Commission remarked, the matter "remain[ed] a close case."<sup>14</sup>

Consistent with this assessment, the Commission emphasized that pro-competitive commitments would not necessarily carry the day in other contexts:

Granting this application subject to conditions does not mean applicants will always be able to propose pro-competitive public interest commitments that will offset potential harm to competition. Nor would these particular conditions necessarily justify approval of another proposed merger for which applicants had not otherwise carried their burden of proof. . . . As competitive concerns increase, it becomes significantly more difficult for applicants to carry their burden to show that the proposed transaction is in the public interest.<sup>15</sup>

Moreover, the Commission noted its concern that additional mergers involving large incumbent LECs could hinder its ability to "carry out properly its responsibilities to ensure just and reasonable

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<sup>12</sup> Id. at ¶¶ 8 - 12.

<sup>13</sup> Id. at ¶ 11.

<sup>14</sup> Id. at ¶ 12.

<sup>15</sup> Id. at ¶ 15.

rates, to constrain market power in the absence of competition, and to ensure the fair development of competition that can lead to deregulation," allowing greater opportunities for coordinated action among incumbents and depriving regulators of meaningful cross-carrier performance comparisons.<sup>16</sup>

## **II. Applying the Standard**

In the Application, SBC commits to "immediately begin to implement its aggressive National-Local Strategy to offer competitive local exchange, long distance and other telecommunications services to businesses and residences in the 30 largest U.S. local markets outside its incumbent service area."<sup>17</sup> According to SBC, "[t]he list of service areas in which the new SBC will provide local exchange service includes those currently served by Bell Atlantic, BellSouth, US West and GTE, among other ILECs."<sup>18</sup> But for the proposed merger, among the "30 largest U.S. local markets outside its incumbent service area" would be such Ameritech markets as Chicago, Detroit, Cleveland, Indianapolis and Milwaukee. As made clear in its 1997 Annual Report, SBC has always intended to provide "local exchange service offerings" in "territories served by other LECs."<sup>19</sup>

Ameritech, likewise, has planned to provide local exchange and exchange service in areas served by other incumbent LECs. Indeed, Ameritech is currently certified to provide such

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<sup>16</sup> Id. at ¶ 16.

<sup>17</sup> Description of the Transaction, Public Interest Showing and Related Demonstrations at 12.

<sup>18</sup> Id. at 13.

<sup>19</sup> SBC Communications Inc. 1997 Annual Report, "Management's Discussion and Analysis of Financial Condition and Results of Operations, p. 26.

services in 13 states outside of its region, having ventured first into the SBC State of Missouri and ultimately into the SBC States of California and Texas.<sup>20</sup>

Admittedly, neither SBC nor Ameritech is currently a "significant market participant" in the wireline local exchange markets served by the other carrier.<sup>21</sup> As SBC makes abundantly clear, however, each represents to the other not only a significant potential competitor, but a likely one. Thus, SBC has declared that its strategy is to enter major out-of-region markets "quickly:"

SBC believes that it is critical to do so in order to serve the needs of the large and mid-size business customers that will form the base or 'anchor' for this entry and establish 'first mover' advantages.

To that end, the new SBC will also deploy over 60 new switches in the first stage of its plan just to serve large and mid-size businesses. . . . Within three years of closing the proposed merger, SBC plans to have at least two switches within each of the 30 new markets.

To that end, the new SBC will deploy an additional 80 switches in the 30 out-of-region markets to serve residential and small business customers.<sup>22</sup>

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<sup>20</sup> "Number of Large MultiState CLECs Triples Since 1997," Communications Daily (Oct. 8, 1998); "Ameritech Becomes First RHC to Apply for Full Service Outside Region," Communications Daily (Nov. 7, 1997) ("Marketing will be aimed at Southwestern Bell . . . Ameritech officials said St. Louis appears to be an open market with little local competition to incumbent SWB.").

<sup>21</sup> As the Texas Public Utility Commission ("PUC") points out in its comments (at p. 3), however, "SWBT has relied on Ameritech as a viable competitor to add weight to its evidence in the Texas § 271 proceeding." Moreover, the Texas PUC notes that "[w]hile the level of market penetration that ACII could eventually achieve is unclear, Ameritech until recently had been actively involved in testing SWBT's operations support systems (OSS) and had begun passing production orders to SWBT. Ameritech personnel attended SWBT's OSS training sessions in April 1997, and education classes on SWBT's electronic interfaces in August and October 1997."

<sup>22</sup> Description of the Transaction, Public Interest Showing and Related Demonstrations at 13 - 16.

Indeed, as portrayed by SBC, it has little choice but to pursue such a strategy:

As our customers expand, both domestically and internationally, and begin to focus on securing all or substantially all of their telecommunications services from a single source, we could either stand pat and run the risk of losing our large and mid-size customers, who though small in number represent a very large portion of our revenues, or we could expand and compete for the opportunity to follow and serve our customers wherever they might be.

SBC and Ameritech believe that, absent such a widespread, simultaneous, facilities-based, out-of-region and global entry, they will not be able to compete effectively with the other major companies that can now provide a full range of telecommunications services to the large and mid-size business customers located in SBC's and Ameritech's in-region areas. Frankly, SBC and Ameritech have found that, if they remain confined to their regions and engage in only incremental out-of-region expansion, they will be able to compete less effectively for the large and mid-size business customers that are looking to have all (or substantially all) of their service needs met by a single carrier.<sup>23</sup>

In other words, each of SBC and Ameritech will be driven by business necessity to either combine or to compete against one another at least in the major local service markets served by the other as the incumbent. Given this admitted need to expand into one another's markets, the proposed SBC/Ameritech merger would eliminate a future – but nonetheless inevitable – significant market participant from each of SBC's and Ameritech's largest markets.<sup>24</sup> Certainly, both SBC and

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<sup>23</sup> Id. at 3 - 4, 6.

<sup>24</sup> Indeed, SBC and Ameritech are well positioned to enter each others markets. SBC's Missouri and Ameritech's Illinois local markets are adjacent to one another, rendering extension of physical networks far more economically efficient and name recognition much less of an entry barrier. Likewise, SBC's wireless presence in the Chicago metropolitan area and Ameritech's wireless presence in and around St. Louis provide like entry vehicles. Of course, the many decades of experience in providing local exchange and exchange access services, as well as constructing, operating and maintaining local networks, as incumbents, would render both SBC and Ameritech potent competitors in one another's home markets.

Ameritech fit the description of a potential competitor, as that term would be used in assessing the anti-competitive potential of a corporate merger from an antitrust perspective:

The outside firm should be found to have been a probable future entrant where it appears to have had the requisite capabilities for de novo entry and where entry appears to have been economically attractive to it.<sup>25</sup>

While SBC argues that neither it nor Ameritech could undertake such a large scale market expansion but for the merger, this argument rings hollow not only in light of the admitted compelling business need, but the mammoth sizes of the two combining entities. In 1997, SBC reported total assets in excess of \$42 billion, operating revenues of nearly \$25 billion and profits approaching \$1.5 billion.<sup>26</sup> According to SBC, it has invested \$23 billion over the past five years in upgrading and expanding its networks, as well as \$1.1 billion to open its networks to competitors.<sup>27</sup> Since divestiture, SBC has experienced a total annual compounded return in excess of 21 percent.<sup>28</sup> Ameritech's numbers are equally impressive. Ameritech reported total assets of \$16 billion in 1997, with operating revenues of nearly \$16 billion and profits in excess of \$2 billion.<sup>29</sup> Ameritech has averaged annual capital expenditures well in excess of \$2 billion over the past ten

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<sup>25</sup> Areeda, P. & Turner D. F., Antitrust Law, Vol. 5, p. 117 (Little, Brown and Co., 1980).

<sup>26</sup> SBC Communications Inc. 1997 Annual Report, "Selected Financial and Operating Data," p. 18.

<sup>27</sup> Id. at "The SBC Value Equation" at pp. 11, 17.

<sup>28</sup> Id. at p. 3.

<sup>29</sup> 1997 Ameritech Annual Report, "Selected Financial and Operating Data," p. 22.

years.<sup>30</sup> And Ameritech has experienced 17 consecutive quarters of double-digit earnings growth, a record among major U.S. communications companies.<sup>31</sup>

Certainly, each of SBC and Ameritech have greater financial wherewithal than most of the competitive LECs with whom they will be entering new local markets. If a competitive LEC must be capitalized to the extent of \$60 billion in order to compete in the local telecommunications market, a fundamental premise underlying the Telecommunications Act is entirely false. There is no role for small, mid-size or even large entities; only behemoths may participate in the market. Monopoly bastions will not be supplanted by competitive markets, but by duopolies and oligopolies in which a few large players divide markets among themselves.

TRA submits that the SBC/Ameritech vision is an erroneous one. While competitive inroads into the local telecommunications market to date have been incremental at best, small and mid-size providers continue to play a significant role. Given the large number of carriers providing local service that are dwarfed by the claimed \$60 billion threshold,<sup>32</sup> SBC's and Ameritech's contention that their merger is a necessary prerequisite to expanded local market entry should be lent little credence.

How significant would be the local competition lost as a result of an SBC/Ameritech merger depends on a variety of factors, including, among others, the extent to which barriers to entry into the local telecommunications market remain in the SBC and Ameritech regions and the degree

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<sup>30</sup> Id.

<sup>31</sup> Id. at "Financial Highlights," p. 2.

<sup>32</sup> "Number of Large MultiState CLECs Triples Since 1997," Communications Daily (Oct. 8, 1998).

to which the combined entity would be better positioned to retain market power. As to the former, neither SBC nor Ameritech has fully complied with the statutory requirements to open its local markets to competition. For example, the Telecommunications Division of the California Public Utilities Commission recently concluded that Pacific Bell had not yet complied with 10 of the 14 "competitive checklist" items, faulting, among other things, the carrier's operations support systems ("OSS") and collocation practices.<sup>33</sup> SBC has been recently faulted by both the Arkansas Public Service Commission and the Texas Public Utility Commission for failure to achieve checklist compliance, the former finding performance deficiencies with respect to eight items, the latter emphasizing OSS failures and deficient performance measurements.<sup>34</sup> And, of course, the two applications for in-region, interLATA authority filed by SBC and Ameritech with the Commission have been denied.<sup>35</sup>

As a result, SBC and Ameritech each retain a market share within their local service areas in the high ninety percentile. SBC touts the 60,000 unbundled local loops it has provided to

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<sup>33</sup> Pacific Bell (U 1001 C) and Pacific Bell Communications Notice of Intent to File Section 271 Application for InterLATA Authority in California, Final Staff Report, Telecommunications Division, California Public Utilities Commission (October 5, 1998).

<sup>34</sup> Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market (Order No. 25 Adopting Staff Recommendations; Directing Staff to Establish Collaborative Process), PUC Project No. 16251 (June 1, 1998); Communications Daily (Sept. 2, 1998).

<sup>35</sup> Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543 (1997); Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma (Memorandum Opinion and Order), 12 FCC Rcd. 8685 (June 26, 1997), *pet. for rev. pending sub nom. SBC Communications Corp. v. FCC*, Case No. 97-1425 (D.C. Cir. July 3, 1997).



competitors and the 94,600 local loops Ameritech has leased to competitive LECs, but these quantities represent a small fraction of a single percent of the network access lines SBC and Ameritech currently have in service.<sup>36</sup> In short, "[c]ompetition is still in its infancy in the vast majority of local areas . . . the incumbent LECs' market share is or approaches 100 percent."<sup>37</sup>

The loss in each of the SBC/PacTel and Ameritech "in-region States" of a likely potential competitor "possess[ed of] competitively significant assets and capabilities that otherwise would enable it to compete [in out-of-region local markets]" obviously is magnified by the continuing refusal of both SBC and Ameritech to fully open their local markets to competition. As the Commission has acknowledged, "[t]he process of lowering barriers to entry is . . . only beginning, not nearing completion," and as a result, "mergers between incumbent monopoly providers and possible rivals during this implementation of the . . . [Telecommunications] Act" must be scrutinized with extraordinary care.<sup>38</sup> Moreover, creating a further need for close scrutiny of a combination of large incumbents, "significant barriers to entry into the local telecommunications marketplace, including interstate exchange access services, will remain" following implementation of the Telecommunications Act.<sup>39</sup> As is apparent, "[b]arriers to entry or expansion are not likely

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<sup>36</sup> Description of the Transaction, Public Interest Showing and Related Demonstrations at 77; SBC Communications Inc. 1997 Annual Report, "Selected Financial and Operating Data," p. 18; 1997 Ameritech Annual Report, "Selected Financial and Operating Data," p. 22.

<sup>37</sup> Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc. (Memorandum Opinion and Order), CC Docket No. 97-211, FCC 98-225, ¶ 168 (Sept. 14, 1998).

<sup>38</sup> Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985 at ¶ 4.

<sup>39</sup> Id. at ¶ 6.

to be sufficiently low that actual or potential competitors can and would expand or enter with sufficient strength, likelihood and timeliness to render unprofitable an attempted exercise of market power resulting from the merger."<sup>40</sup>

Given the continuing failure of SBC and Ameritech to fully open their local markets to competition, the competitive harms that would flow from this proposed merger of major incumbents are multifaceted, bearing in mind that the resulting entity would serve roughly 40 percent of all telephone lines in the nation.<sup>41</sup> On the simplest level, as noted above, a significant source of competition would be lost.<sup>42</sup> This loss, however, involves not merely the loss of a single competitor, but an entity which because of its expertise, experience and financial resources could force the elimination of operational barriers to entry, benefitting in so doing others competitors as well as itself.<sup>43</sup> Who better to identify and facilitate correction of OSS deficiencies and other operational impediments to successful order processing, provisioning, maintenance, repair and billing than an incumbent LEC operating outside its local service area. As the Commission has

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<sup>40</sup> Id. at ¶ 46.

<sup>41</sup> Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Trends in Telephone Service, p. 98, Table 19.2 (July 1998).

<sup>42</sup> "As a general matter, a monopolist's acquisition of a 'likely' entrant into the market in which monopoly power is held is presumptively anticompetitive." Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985 at ¶ 139, fn 263 (*citing* Areeda, P. E., & Hovenkamp, H., Antitrust Law, Vol 3., pp. 134 - 136 (rev. ed. 1996)).

<sup>43</sup> Id. at ¶ 107 (An incumbent LEC "has substantial experience serving mass market customers of local exchange and exchange access services . . . an incumbent LEC entering an out-of-region local market would bring particular expertise to the interconnection negotiation and arbitration process because of its intimate knowledge of local telephone operation. . . . the competitive assets possessed by . . . [an incumbent LEC] are unlikely to be quickly duplicated by smaller market participants.").

recognized, "even if a new entrant is able merely to 'shake things up' or 'engender competitive motion,' that alone may make a significant contribution to competition."<sup>44</sup>

Also lost as a result of the dwindling number of large incumbent LECs would be enforcement and ultimately deregulatory opportunities. As the Commission has explained with regard to the former:

A reduction in the number of separately owned firms engaged in similar businesses will likely reduce this Commission's ability to identify, and therefore to contain, market power. One way that this can happen is by reducing the number of separately owned and operated carriers that can act as "benchmarks" for evaluating the conduct of other carriers or the industry as a whole.<sup>45</sup>

Moreover, as the Commission emphasized, the BOCs themselves have often relied upon the availability of such "benchmarks" as means of detecting anticompetitive abuses in justifying requests for judicial or regulatory relief. As succinctly described by Judge Harold H. Greene more than a decade ago:

Much is made by the Regional Companies of the circumstance that they are *seven* . . . The Regional Companies . . . argue that now, unlike then, benchmarks exist by which the performance of one of them can be measured against that of the *six others*.<sup>46</sup>

Obviously, the effectiveness of comparative analysis diminishes as the number of points of comparison is decreases.

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<sup>44</sup> Id. at ¶ 139.

<sup>45</sup> Id. at ¶ 147.

<sup>46</sup> United States v. Western Electric Co., 673 F. Supp 525, 547 - 48 (D.D.C. 1987), aff'd in part, rev'd in part, 900 F.2d 283 (D.C.Cir. 1990), cert denied sub nom. MCI Communications v. United States, 498 U.S. 911 (1991) (emphasis added).

The Commission has also recognized that the dwindling number of large incumbent LECs "may also hinder and delay the transition to competitive, deregulated telecommunications markets by making it more difficult for the Commission and state regulators to develop and enforce necessary procompetitive rules."<sup>47</sup> Such an impact may arise from omission or commission. As the Commission points out, "[m]ergers between incumbent LECs will likely reduce experimentation and diversity of viewpoints in the process of opening markets," reducing opportunities "to discover solutions to issues and to resolve problems sooner than . . . [they] otherwise would."<sup>48</sup> "Another likely harmful effect of mergers of major incumbent LECs is to increase their ability and incentive to resist the pro-competitive process," lessening incentives for individual incumbents to "break ranks" with other incumbents.<sup>49</sup> While the Commission concluded with respect to the Bell Atlantic/NYNEX merger that alone "the reduction in the number of Bell Companies from six to five . . . [did] not sufficiently impair . . . [its] ability to ensure just and reasonable rates, constrain market power, or establish and enforce pro-competitive rules necessary to achieve competition and deregulation" to support a finding that the combination was not in the public interest, relying upon the applicants' assertions that "there will remain '5 RBOCs, GTE, SNET and countless other independents'," approval of all the incumbent LEC mergers currently pending before it would eliminate yet another BOC, as well as GTE and SNET.<sup>50</sup>

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<sup>47</sup> Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985 at ¶ 152.

<sup>48</sup> Id. at ¶ 152 - 53.

<sup>49</sup> Id. at ¶ 154.

<sup>50</sup> Id. at ¶¶ 155 -56.

Against these innumerable competitive harms, SBC and Ameritech essentially assert a single purported public interest benefit -- the increased flexibility and efficiencies sometimes associated with greater size. Because the merged entity will have a larger financial base, it assertedly will be able to jump-start local competition and compete head to head with foreign giants. Because the merged entity will provide service to a greater number of customers, it will purportedly realize efficiencies of scope and size. Because the merged entity will become one of only a handful of integrated service providers, it will assertedly be better able to satisfy the full range of its customers' telecommunications needs. In other words, bigger is better and what is good for SBC/Ameritech is good for the country.

The Bell System was dismantled for a reason. Bigger can also mean no competitive alternatives. Bigger can mean anticompetitive abuses. Bigger can mean unbridled power. As Judge Greene remarked in describing the break-up of the Bell System:

The present controversy had its genesis shortly after World War II. At that time the government became concerned about apparent violations of the antitrust laws by the Bell System . . . The monopoly of the Bell System in the provision of telephone service, which theretofore had been regarded as a given fact, had come to be questioned in the wake of the discovery that microwaves could be substituted for copper wires for the transmission of long distance telephone conversations. At the same time, the practice of the Bell System's local Operating Companies to satisfy their huge switching and other equipment needs exclusively from AT&T's affiliate Western Electric, rather than to make use also of outside suppliers, began to be challenged by small, efficient manufacturers with special expertise and special products to sell.

Initially, the Bell System brushed off these attempts at competition as bothersome obstacles to its endeavor to provide integrated and efficient telephone service to the American people, but eventually the complaints of the would-be competitors came to be heard by the Federal Communications Commission . . . Thereafter, the FCC

struggled with one complaint against the Bell System after another. Although after drawn-out proceedings the Commission was able at times to achieve some small success, it eventually became apparent to everyone, including those in charge of regulation at the Commission, that the FCC, with its relatively small staff and other resources, and its limited authority, would never be able to cope successfully with the Bell System's powerful monopoly position and its ever-changing strategies.<sup>51</sup>

Size thus can bring benefits, but it also can have dangerous consequences. Congress made a judgment in the Telecommunications Act that competition is the means by which the benefits of advances in telecommunications and information technologies and services are to be brought to the American people.<sup>52</sup> Rather than recreate a single unified provider of telephone and information services, Congress adopted "a pro-competitive, deregulatory national policy framework" with the stated intent of "opening all telecommunications markets to competition."<sup>53</sup> Congress did not envision that the product of its herculean legislative effort would be monopoly, duopoly or oligopoly; Congress sought to foster competition. Market entry, not corporate acquisition, was the guiding theme of the Telecommunications Act.

Claims of enhanced efficiencies, increased financial strength and greater scope economies can always be made, if seldom proved, in the context of a proposed merger. TRA submits that whatever may be these benefits, the competitive harms attendant to the continuing combinations of BOCs and other large incumbent LECs far outweigh them. BOCs can best further the public interest by opening their local markets to competition and vigorously competing with one

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<sup>51</sup> United States v. Western Electric Co., 673 F. Supp 525 at 529 - 30.

<sup>52</sup> S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) ("Conference Report").

<sup>53</sup> Id.

another in the provision of local and other service offerings. BOC mergers will increasingly produce large private gains with at best marginal public benefits, offset by significant competitive harms. As the Commission found with respect to the Bell Atlantic/NYNEX merger, SBC and Ameritech simply "have not carried their burden of demonstrating that the proposed merger will create verifiable merger-specific efficiencies that offset the merger's competitive harms."<sup>54</sup>

### **III. Recommendations**

At a minimum, TRA recommends that any grant of the proposed merger of SBC and Ameritech be conditioned upon the commitments extracted from Bell Atlantic and NYNEX as a precondition to approval of their combination. It is not at all clear to TRA, however, that mere acquiescence to these conditions should be sufficient to warrant grant of the authority SBC and Ameritech seek here. As the Commission has recognized, "[a]s competitive concerns increase, it becomes significantly more difficult for applicants to carry their burden to show that the proposed transaction is in the public interest."<sup>55</sup> In this regard, two factors weigh heavily against approval of the SBC/Ameritech merger.

The first factor is the dwindling number of large incumbent LECs. When the SBC/PacTel combination was sanctioned there were seven BOCs and a significant number of large independent LECs. Now, there are five BOCs with two of the largest independent LECs having been identified as acquisition targets. The second factor is the passage of time. When the

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<sup>54</sup> Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985 at ¶ 168.

<sup>55</sup> Id. at ¶ 15.

SBC/PacTel and Bell Atlantic/NYNEX mergers were approved, only 18 months had passed without significant competitive inroads into the local exchange market. By the time the Commission acts on the proposed SBC/Ameritech merger, nearly three years will have passed with little new competitive progress to show in the interim.

What then is the answer? At some point the Commission must simply draw the line and refuse to permit any further combinations of large incumbent LECs until such time as they have ceased to be the dominant provider in the market. Given the continuing refusal of incumbent LECs, including SBC and Ameritech, to fully open their respective local markets to competitive entry, that time is probably now. The Commission cannot, and should not, sit idly by as resistant monopolists fortify their monopoly bastions against competitive intrusion.

Short of outright denial, TRA recommends that the Commission up the ante by converting mere post-merger commitments into pre-merger conditions. In other words, let actions rather than words be the driving force. Require SBC and Ameritech to implement the various commitments enumerated in Appendices C and D to the *Bell Atlantic/NYNEX Merger Order*, as well as any further conditions imposed here, before permitting them to consummate the proposed transaction.

TRA also recommends that the Commission revisit several conditions it rejected in the *Bell Atlantic/NYNEX Merger Order*. Two matters are of particular importance in this regard. First, identification of "competitive checklist" compliance as a precondition to merger approval would further statutory and regulatory aims, requiring SBC and Ameritech to do what they are required by law to do anyway in order to secure a benefit to which they have no entitlement. Obviously, in-region, interLATA authority has proven to be an inadequate "carrot," primarily

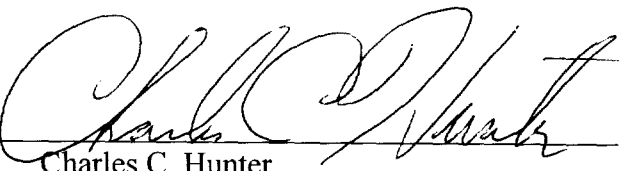


because the BOCs believe that they will eventually be granted such authority without "competitive checklist" compliance if they maintain political pressure at a high enough level. Perhaps the merger "grail" will prove more enticing.

The second matter TRA believes should be revisited involves various reforms necessary to render local competition viable, including the provision of unbundled network element ("UNE") "platforms," as well as UNEs in existing combinations, and collocation reform, encompassing the availability of electronic means of disassembling and recombining UNEs, as well as such variations as "cageless" and "shared" collocation. It has become more and more apparent that these reforms are essential to broad scale local competition. Accordingly, these are the types of conditions that potentially could offset the significant competitive harms associated with a merger among a declining population of large incumbent LECs.

Respectfully submitted,

**TELECOMMUNICATIONS  
RESELLERS ASSOCIATION**

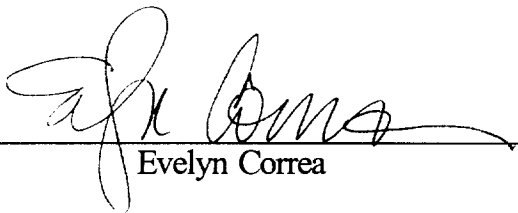
By:   
Charles C. Hunter  
Catherine M. Hannan  
HUNTER COMMUNICATIONS LAW GROUP  
1620 I Street, N.W.  
Suite 701  
Washington, D.C. 20006  
(202) 293-2500

October 15, 1998

Its Attorneys

## **CERTIFICATE OF SERVICE**

I, Evelyn Correa, hereby certify that a true and correct copy of the foregoing document has been served by United States First Class Mail, postage prepaid, this 15th day of October, 1998, on the individuals listed on the attached service list.



Evelyn Correa

Magalie Roman Salas, Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554  
(By Hand Delivery)

Carol E. Matthey, Chief  
Policy and Program Planning Division  
Federal Communications Commission  
Common Carrier Bureau  
1919 M Street, N.W.  
Room 544  
Washington, D.C. 20554  
(Two Copies, By Hand Delivery)

Regina M. Keeney, Chief  
International Bureau  
Federal Communications Commission  
2000 M Street  
Room 800  
Washington, D.C. 20054  
(Two Copies, By Hand Delivery)

Steven E. Weingarten, Chief  
Commercial Wireless Division  
Federal Communications Commission  
2100 M Street, N.W.  
Room 7023  
Washington, D.C. 20554  
(By Hand Delivery)

Ms. Jeanine Poltronieri  
Wireless Telecommunications Bureau  
2025 M Street, N.W.  
Room 5002  
Washington, D.C. 20054  
(By Hand Delivery)

Ms. Cecilia Stephens  
Policy and Program Planning Division  
Federal Communications Commission  
Common Carrier Bureau  
Room 544  
1919 M Street, N.W.  
Washington, D.C. 20554  
(w/diskette, By Hand Delivery)

Wayne Watts  
General Attorney and Assistant General  
Counsel  
SBC Communications, Inc.  
175 E. Houston  
San Antonio, TX 78205

Lynn Starr  
Executive Director, Federal Relations  
Ameritech Corp.  
1401 H Street, N.W.  
Suite 1020  
Washington, D.C. 20005

International Transcription Services, Inc.  
1231 20th Street, N.W.  
Washington, D.C. 20036  
(By Hand Delivery)